LIBRARY
SUPREME COURT, U. S.

FILED
JUL 23 1970
E. ROBERT SEAVER, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 444

MRS. ROBERT LEE MOORE, ET AL,
Appellants

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,
Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

JURISDICTIONAL STATEMENT

WHITEFORD S. BLAKENEY
North Carolina National Bank Building
Charlotte, North Carolina
Attorney for the Appellants

Of Counsel:
WILLIAM H. BOOE
Law Building
Charlotte, North Carolina

INDEX

	Page No.
THE OPINION OF THE COURT BELOW	1
THE JURISDICTION OF THIS COURT	2
QUESTIONS PRESENTED BY THIS APPEAL	4
STATEMENT OF THE CASE	4
THE SIGNIFICANCE OF THIS CASE	8
CONCLUSION	14

Appendix:

Opinion Of The Court Below	1a
Judgment Of The Court Below	21a
Notice Of Appeal To The Supreme Court Of The United States	23a
Full Caption Of The Case	24a

Cases:

Brown vs. Board of Education, 347 US 483, 74 S Ct 686, 98 L Ed 873 and 349 US 294, 75 S Ct 753, 99 L Ed 1083 — 4, 5, 6, 8, 11, 13

Idlewild Bon Voyage Liquor Corp. vs. Epstein, 370 US 713, 82 S Ct 1294, 8 L Ed 2d 794 — 2

Page No.

Northcross vs. Board of Education of Memphis, Tennessee, —US—, 90 S Ct—, 25 L Ed 2d 246 9

Swann, et al vs. Charlotte-Mecklenburg Board of Education 7

United States vs. Georgia Public Service Commission, 371 US 285, 83 S Ct 397, 9 L Ed 2d 317 2

Statutes:

28 USC §1253 2

28 USC §1441 6

28 USC § 2281 2

28 USC § 2284 6

General Statutes of North Carolina § 115-176.1 4

Constitution of the United States:

Fourteenth Amendment to the Constitution of the United States 4, 5, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO.

MRS. ROBERT LEE MOORE, ET AL,

Appellants

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,

Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

---

JURISDICTIONAL STATEMENT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

This case comes to this Court by appeal, and the appellants respectfully present to the Court:

THE OPINION OF THE COURT BELOW

As shown above, the decision from which this appeal is taken was rendered by a three-judge Court in the United States District Court for the Western District of North Carolina. The opinion delivered by that Court has not yet been published in printed reports

but is fully set forth in the Appendix which is attached hereto. The judgment of the lower Court is likewise printed in the attached Appendix.

THE JURISDICTION OF THIS COURT

This suit originated in the North Carolina State Courts. Because the case involved claim of right arising under the Constitution of the United States, it was removed into the United States District Court for the Western District of North Carolina. There, by reason of the applicability of 28 USC § 2281, it was heard by a three-judge court.

The judgment of the three-judge District Court is dated June 22, 1970, and it was entered on that date.

Notice of appeal, directly to this Court, was filed by the plaintiffs on June 23, 1970, in the United States District Court for the Western District of North Carolina.

Jurisdiction of this appeal is conferred on this Court by 28 USC §1253.

Recent examples of the many decisions sustaining the jurisdiction of this Court upon such appeals as this, directly from three-judge district courts, are:— *United States vs. Georgia Public Service Commission*, 371 US 285, 83 S Ct 397, 9 L Ed 2d 317; *Idlewild Bon Voyage Liquor Corp. vs. Epstein*, 370 US 713, 82 S Ct 1294, 8 L Ed 2d 794.

A North Carolina statute is here involved, and question as to whether it, and an injunctive order issued by the North Carolina court, are in harmony or in con-

flict with the United States Constitution, constitutes the essential matter here at issue. The statute reads as follows:

> *"Assignment of pupils based on race, creed, color or national origin prohibited.*—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.
>
> "Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

General Statutes of North Carolina, § 115-176.1, Vol 3A, p. 173.

QUESTIONS PRESENTED BY THIS APPEAL

Are not the pertinent provisions of the North Carolina statute and the injunctive order issued by the North Carolina court in harmony with the Fourteenth Amendment to the United States Constitution as expounded by *Brown vs. Board of Education*?

If so, then upon the facts and circumstances shown by the record in this case, is not the injunctive order issued by the North Carolina court valid and proper?

STATEMENT OF THE CASE

The appellants, who include white and Negro citizens, residents, parents, children and taxpayers of the

City of Charlotte and County of Mecklenburg, North Carolina, instituted this suit, on February 22, 1970, in the Superior Court of Mecklenburg County, North Carolina.[1] They alleged that the defendant Board of Education was about to put into operation and effect a program, the purpose, plan and design of which was to exclude from public schools and assign to public schools thousands of children in the City of Charlotte and Mecklenburg County solely according to their race and color.

In their complaint, the plaintiffs asserted that this would violate legal rights guaranteed to them by the Fourteenth Amendment to the United States Constitution, as enunciated by the United States Supreme Court in *Brown vs. Board of Education*, 347 US 483 and 349 US 294, and by the North Carolina statute quoted above, General Statutes of North Carolina, § 115-176.1.

The State Court agreed that this was so and issued an order as follows:

"That the defendants are hereby enjoined and restrained from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which any children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed

[1]The full caption of the case, setting forth the names of the parties, is printed in the Appendix hereto.

Charlotte-Mecklenburg public school because of their race or color."

The defendants moved the case into the United States District Court for the Western District of North Carolina upon the ground that the plaintiffs were asserting rights involving and drawing into issue provisions of the United States Constitution and that the case was therefore one over which the federal courts properly had jurisdiction. 28 USC § 1441.

The defendants further moved, under 28 USC §2281, for the convening of a three-judge court to pass upon the constitutionality of the aforesaid State statute and, consequently, the validity or invalidity of the aforesaid State Court injunction—such injunction having been issued upon the view that the North Carolina statute and the United States Constitution, as construed in *Brown vs. Board of Education,* are in harmony with each other and that the State court injunction was therefore supported alike by the United States Constitution and the North Carolina statute.

A three-judge court, constituted as required by 28 USC §2284, was thereupon convened. Before it conducted its hearing, however, a single judge of the United States District Court for the Western District of North Carolina "suspended and held in abeyance and of no force and effect" the aforesaid State court injunction "pending the final determination by a three-judge Court or by the Supreme Court of the issues which will be presented to the three-judge

Court." United States District Court Order of March 6, 1970.

Prior to the hearing before the three-judge court, all essential questions of fact in the case became resolved through the defendants' answers to the factual allegations of the plaintiffs' complaint and by later discovery proceedings in the form of requests for admissions and answers thereto.

The three-judge Court held its hearing on March 24, 1970. On the same day, it heard a related case, *Swann, et al vs. Charlotte-Mecklenburg Board of Education.*[1]

On April 29, 1970, the three-judge Court rendered its decision. The Court struck down a central provision of the State statute and of the State Court injunction. The statute provides that "no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins." The Court ruled that this provision is unconstitutional, for that, according to the holding of the Court, the Fourteenth Amendment to the United States Constitution requires that children may be assigned and compelled to attend public schools according to race and for the very purpose of "creating a balance or ratio of race."

---

[1]Since then the *Swann* case has been heard, in previously litigated aspects, by the United States Court of Appeals for the Fourth Circuit and is now before this Court, in those aspects, upon a grant of Writ of Certiorari.

Thus, the Court, in its "Final Judgment" adjudged the statutory provision, forbidding school assignments according to race, to be "unconstitutional, void and of no effect," and declared that "all parties are hereby enjoined from enforcing, or seeking" to enforce this prohibition against racial assignments.

The plaintiffs, believing and contending that this ruling is a direct and basic and complete contradiction of the meaning of the Fourteenth Amendment to the United States Constitution as construed and established by *Brown vs. Board of Education*, now appeal to this Court.

THE SIGNIFICANCE OF THIS CASE

This case concisely presents the issue which lies at the heart of today's great legal controversy in the realm of race and the public schools, namely:—In public school assignments, does the United States Constitution require freedom without regard to race, or may it require compulsion according to race?

The plaintiffs, upon brief and argument, will endeavor to show to the Court that on this issue, the former alternative and not the latter is the only true answer—the only answer that does not fatally conflict with fundamental freedom—the only answer which does not create unending dilemmas of illogic and inconsistency—the only answer which can actually be carried into effect.

The plaintiffs' present purpose, however, is to emphasize that "the time" having come, as the Chief

Justice recently declared,[1] "to clear up" at least some of the confusion in this field, the present case is a most apt vehicle for doing so.

Most of the public school cases coming before the appellate courts have been quite complex and tangled, characterized by voluminous records, intricate pleadings and highly controverted and unresolved fact situations, and overlarded with orders and rulings that are often ambiguous and usually more administrative than judicial in nature.

By contrast, the present case is wholly uncomplicated, the record is notably simple, the necessary factual background is established beyond controversy, the issue of the case is sharply focused, and the court orders involved are directly to the point.

The plaintiffs alleged in their complaint, and the defendants admitted in their answer, that the United States District Court for the Western District of North Carolina has found it to be a fact:—That in the Charlotte-Mecklenburg Public School System, there is "no racial discrimination" in the expenditure of "money" or the "providing" of "facilities" and no "inequality based upon racial motives" with respect to the "quality" of "teachers" or "books" or "school buildings" or "athletics" or "school fees" or "free lunches" or "elective courses" or the "evaluation of students"; that in the Charlotte-Mecklenburg Public School System, each year any pupil is at liberty "to request assign-

[1] *Northcross vs. Board of Education of Memphis, Tennessee,* —US—, 90 S Ct.—, 25 L Ed 2d 246, 250.

ment to another school," and "no reason for transfer need be given," and "all transfer requests are honored," unless the school to which transfer is requested is "full"; that the Charlotte-Mecklenburg Board of Education has "achieved a degree and volume" of inter-mixing of Negro children and white children in the Charlotte-Mecklenburg public schools which has "exceeded" the "performance" of "any school board whose actions have been reviewed in appellate court decisions."

It is further alleged and admitted that the intermixing of the many thousands of white children and the many thousands of Negro children, who now attend schools and classrooms together in Charlotte and Mecklenburg County, has come about without denial of access to any child at any school because of his race or compulsory assignment of any child to any school because of his race.

Yet, as is further alleged and admitted, the same United States District Court which made the findings of fact outlined above has ordered the defendant Charlotte-Mecklenburg Board of Education to implement, and the Board is about to proceed with implementing, a program under which children in Charlotte and Mecklenburg County, solely because of their race and color, are to be denied access to schools they wish to attend and, solely because of their race and color, are to be compelled to attend schools they do not wish to attend.

Still further, as is alleged and admitted, the United States District Court has ordered the Charlotte-Mecklenburg Board of Education to enforce such denials and such compulsions as "a continuing program" and to "maintain" this program as a "continuing control over the race of children in each school, such as was done for many decades before *Brown vs. Board of Education*." The District Court thus expressly and avowedly returns to a governmental policy of determining and permanently controlling the assignment of children to public schools on the basis of race—the same denial of individual liberty and the same offense against the United States Constitution which *Brown vs. Board of Education* sought to outlaw forever.

Even further, the issue is sharply etched in this case. The record includes exhibits which show that under the "program" ordered by the District Court, the boundaries of the attendance districts or zones in the Charlotte-Mecklenburg Public School System are about to be redrawn in a manner constituting obvious and grotesque gerrymandering. Such exhibits also show the "pairing" of numerous schools in the Charlotte-Mecklenburg Public School System for the purpose of requiring children in those schools to travel outside their own zone and district in order to attend school.

Through discovery procedure, it stands admitted and established in the record that this redrawing of attendance district boundaries and also this "pairing" of numerous schools "is shaped and controlled by

racial considerations" and "by a conscious and purposeful effort to obtain and to require a certain "racial ratio" in "each school."

Thus, the extraordinary but undeniably true picture here presented is that of a public school "program" for Charlotte and Mecklenburg County, under which the color of the children will be the dominant criterion—the all-controlling imperative. The child's color will determine what the school authorities do with him.

Because of the children's race—and for no other reason—the school attendance directives are to be reshaped, no matter how unnaturally or tortuously. Because of their race—and for no other reason—thousands of these children, black and white, are to be taken, against their will, out of the schools they have attended and compelled to go to more distant locations and there attend school—no matter how ruthless the violation of their freedom, no matter how serious the effects upon them and their families and no matter how great the resulting cost to the taxpaying public.

This force and compulsion in so vital an area of life, imposed by government on the child, solely because of his race—and subsumed in the current phrase, "involuntary busing—has aroused widespread, intense and unrelenting opposition among the plaintiffs, white and black, and the citizens, parents, children, residents and taxpayers for whom they speak.

Against this stark factual background, the clash of the court orders which have been issued in this case is equally direct and vivid. The State Court determined that, upon this factual showing, it was justified, by *Brown vs. Board of Education* and by North Carolina statute alike, in ordering the Charlotte-Mecklenburg Board of Education not to deny any children "access to any Charlotte-Mecklenburg Public School because of their race or color" and not to compel any children "to attend any prescribed Charlotte-Mecklenburg Public School because of their race or color."

The United States District Court, as hereinbefore pointed out, "suspended and held in abeyance and of no force and effect" the State Court order "pending the final determination by a three-judge Court or by the Supreme Court of the issues which will be presented to the three-judge Court."

Then the three-judge Court issued "final judgment" simultaneously voiding the North Carolina Statute and the State Court injunction, upon the ground that it is "unconstitutional" to prescribe that "no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins."

Thus, there is posed in this case as clearly as can ever be presented, the central issue of this great and urgent controversy, that is, whether *Brown vs. Board of Education* is indeed now reversed—and whether the

United States Constitution does indeed now command that children may be denied access to public schools, and compulsorily assigned to public schools, according to their race and their color—and whether a statute and a court injunction are indeed "unconstitutional" if, in a case such as this, they forbid such denial and such compulsion.

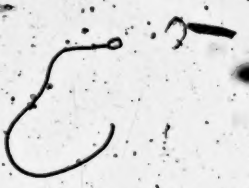
CONCLUSION

Upon all of the foregoing, the appellants pray the Court to note probable jurisdiction of this case and to order the case set for full hearing and argument upon the merits.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Appellants

APPENDIX



INDEX TO APPENDIX

	Page No.
OPINION OF THE COURT BELOW	1a
JUDGMENT OF THE COURT BELOW	20a
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES	23a
FULL CAPTION OF THE CASE	24a

OPINION OF THE COURT BELOW

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 1974

JAMES E. SWANN, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDIN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON

ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al.,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

Mr. J. LeVonne Chambers (Chambers, Stein, Ferguson & Lanning) and James M. Nabrit, III, for Plaintiffs in No. 1974; Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) and Mr. Benjamin Horack, for Defendants in No. 1974; Mr. Ralph Moody, Deputy Attorney General, and Mr.

Andrew A. Vanore, Jr., Assistant Attorney General for State Defendants and Additional Parties-Defendant in No. 1974; and Mr. William H. Booe and Mr. Whiteford S. Blakeney, for other Additional Parties-Defendant in No. 1974.

Mr. William H. Booe and Mr. Whiteford S. Blakeney for Plaintiffs in No. 2631; and Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) for Defendants in No. 2631.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the anti-bussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to desegregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be

bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al. v. William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education*, in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation

[1]On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring busing of students pending appeal to the higher court.

[2]There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 24, 1970.

of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al. v. Charlotte-Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools*, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested. and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidated for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national orgin. No school attendance

district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g., Green v. County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968). In support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegration tools except nongerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and freedom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute

only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)[3] Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his

---

[3] § 2000c:

As used in this subchapter—

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N.C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States v. School Dist. 151 of Cook Co.*, 404 F. 2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can

be interpreted so as not to conflict with the federal Constitution. But to read the statute as innoculously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegrate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Bailey v. Patterson*, 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system

either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross v. Bd. of Ed. of the Memphis City Schools*, ___ U.S. ___, 38 L.W. 4219 (1970); *Alexander v. Holmes Co. Bd. of Ed.*, 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.[1]

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is

---

[1] The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northcross v. Bd. of Ed. of the Memphis City Schools, — U. S. —, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's performance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I).

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board non-invidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and

neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968), *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294 (1955) (*Brown* II), and *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking

affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross v. Bd. of Ed. of the Memphis City Schools*, —U.S.—, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, clause 2 of the Constitution).

V. [sic]

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statue.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation

suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

JUDGMENT OF THE COURT BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA, CHARLOTTE DIVISION

CIVIL NO. 1974

JAMES E. SWANN; et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM MCNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. MCLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R.

CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al.,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

FINAL JUDGMENT

Upon reconsideration of our memorandum opinion filed April 28, 1970, we withdraw Part V.

It is now ORDERED, ADJUDGED and DECREED that the following portion of N. C. General Statute 115-176.1 prohibiting assignment by race and bussing be and hereby is held unconstitutional, void, and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in con-

travention of this article is prohibited, and public funds shall not be used for any such bussing.

All parties are hereby enjoined from enforcing, or seeking the enforcement of, the foregoing portion of the statute.

Plaintiffs' motion to hold defendants in contempt is denied; the various motions to dismiss are denied.

This 22 day of June, 1970.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

JOHN D. BUTZNER, JR.
United States Circuit Judge

JAMES B. MCMILLAN
United States Circuit Judge [sic]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

MRS. ROBERT LEE MOORE, ET AL,
Plaintiffs
vs.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,
Defendants

Civil Action No. 2631

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On June 22, 1970, a "Final Judgment" was entered by the three-judge district court in this cause.

The plaintiffs hereby give notice of appeal, and do hereby appeal, from such Judgment to the Supreme Court of the United States.

This appeal is taken, and this Notice of Appeal is entered, pursuant to the provisions of 28 U.S.C. 1253.

This 23rd day of June, 1970.

WM. H. BOOE

W. S. BLAKENEY

Attorneys for the Plaintiffs

FULL CAPTION OF THE CASE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO.

MRS. ROBERT LEE MOORE, for herself and for her minor children, OSCAR MOORE, LOIS MOORE, GRACE MOORE and JERRY MOORE, J. D. LITTLE, JR. and BETTIE C. LITTLE, for themselves and for their minor child, ALEC LITTLE, JOHN T. VERNON and NANCY H. VERNON, for themselves and for their minor children, PATTY VERNON, DAVID VERNON and ERIC VERNON, FLOYD T. BOYCE and LOUISE D. BOYCE, for themselves and for their minor children, LOU ANN BOYCE, LISA C. BOYCE and FLOYD T. BOST, JR., V. DON PERRIN and NANCY G. PERRIN, for themselves and for their minor children, VIC PERRIN, DONNA PERRIN and SANDRA PERRIN, JACK V. SCOTT and JANE B. SCOTT, for themselves and for their minor children, KENNY SCOTT and CRAIG SCOTT, MRS. MARTHA M. GLENN, for herself and for her minor child, CONNIE GLENN, WILLIAM M. HOOD, JR. and MARY D. HOOD, for themselves and for their minor children, ROBY WRENN HOOD, WILLIAM M. HOOD, III and MARY LIB HOOD, JOHN D. HASTY, for himself and for his minor children, JOHN D. HASTY, JR. and RENEE HASTY, AUBREY E. EASTERLIN, JR., for himself and for his minor step-children, BILLIE SEW-

ELL, VICKIE SEWELL and KIM SEWELL, JAMES E. KING, for himself and for his minor children, LEIGH KING, CYNTHIA KING, SUSAN KING and JAN KING, MELVIN D. CHILDERS, JR., for himself and for his minor child, CYNTHIA CHILDERS, THOMAS S. WEAVER and MARGARET S. WEAVER, for themselves and for their minor children, LIBBY WEAVER and TERRY WEAVER, TED E. MANNING and JACKIE MANNING, for themselves and for their minor child, STEVEN MANNING, HORACE DAVIS, JR. and EVELYN A. DAVIS, for themselves and for their minor children, HORACE DAVIS, III, EVELYN DAVIS and SUSAN DAVIS, ORRIE B. OATS, for herself and for her minor child, LEROY OATS, JR., THOMAS B. HARRIS, for himself and for his minor children, STEVE HARRIS and KELLY HARRIS, LORENE H. DRESSER, for herself and for her minor child, MICHELL DRESSER, JOHN H. HORNER, for himself and for his minor children, LAURA HORNER, JOHN HORNER and BRIAN HORNER, SHIRLEY C. NAIL, for herself and for her minor children, KIM NAIL and DEANA NAIL, G. DONALD ROBERSON, for himself and for his minor child, CHARLES ROBERSON, RAYMOND KENNETH YOUNG and EDNA R. YOUNG, for themselves and for their minor child, KATHY YOUNG, WILLIAM K. SUMMERVILLE, for himself and for his minor children, MICHAEL SUMMERVILLE and CRAIG SUMMERVILLE, JAMES L. KISER, for himself and for his minor child, KIMBERLY KISER, CHARLES N. BRILEY, for himself and for his minor children, ALLISON BRILEY and NATHANIEL BRILEY, WILLIAM R. DOWTIN and MARION

W. DOWTIN, J. FRANK NEWTON and FRANCES M. NEWTON, W. BAINE MARTIN and ELIZABETH B. MARTIN, EDWARD S. FISHER and EMILY S. FISHER, THOMAS E. MCCABE and ANN R. MCCABE, LLOYD ELLIS ZEDAKER, JR. and MARY FRANCES ZEDAKER, BRENDA A. HILL, BAXTER L. DIXON and HORACE N. WILLIAMSON,

Appellants

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,

Appellees